It may then be summed up as the law of the question that until a contract of insurance is made, the assured or applicant for insurance is bound to communicate to the insurer anything, and more especially any change in the circumstances as they stood at the time of the application, which may affect the conduct of the insurer with reference to the insurance, but that this duty ceases the moment the insurer becomes bound in law, equity or good morals to carry out the contract and deliver a policy, even though the information if given would enable the insurer to avail himself of a technical objection and thus get rid of a bad bargain. *When* the contract is really though not formally made will, it would seem, depend very much on the peculiar circumstances of each case, affected by the usual course of dealing about the subject-matter, and perhaps by that of the parties to the case. The delivery of a formal paper, as a policy, is certainly not in all cases necessary: *Xenos* v. *Wickham*, Law Rep. 2 E. & I. App. 296 (1868); *Lishman* v. *Northern M. Ins. Co.*, *supra*; see also *Morrison* v. *Universal M. Ins. Co.*, 27 Law Times R. N. S. 791 (1873); nor a receipt formally countersigned by the agent, though expressly required by the policy. In *Myers* v. *Keystone Mutual Life Ins. Co.*, 9 Casey 268, where the policy expressly required a countersigning by the agent, but was delivered uncountersigned, LOWRIE, J., said, "We incline also to the opinion that, notwithstanding the express terms of the policy, the countersigning by the agent is not under all circumstances essential. On an equitable interpretation of the whole transaction it may become the duty of the court to dispense with a portion of the forms of contract if it can find any reliable substitute for them, on the principle that cures defective execution of powers where the intention to execute is sufficiently plain." In this case, however, it was held that the delivery was a conditional and not a final one; and from it, and other cases, may be drawn the rule that the contract of insurance is *in fieri* while anything remains "open for dispute or treaty," or anything is to be done by the assured; except perhaps where the thing to be done is the payment of money, which payment has been fixed at a day future by the terms of the contract and a prior date has been fixed for the commencement of the risk. See also *Schwartz* v. *Germania Life Ins. Co.*, 18 Minn. 448. So that the question of the conclusion of the contract resolves itself to that of the intention of the parties, and it would seem is generally to be decided by the jury, though there may arise some cases in which it should be passed upon by the court.

H. BUDD, JR.

Court of Common Pleas, No. 2, of Philadelphia.

BURRILL *v.* HEVNER.

State insolvent laws having for their object the release of a debtor from imprisonment, or even distribution of his assets, but not the discharge of his debts, are not superseded by the Bankrupt Act of Congress.

The Pennsylvania Act of 1842, for the arrest of fraudulent debtors, is in force, and although proceedings in bankruptcy will lie for the same causes, yet the courts will enforce the Act until proceedings in bankruptcy are actually commenced.

THIS was a warrant of arrest under the Act of 12th July 1842,

which provides that a defendant may be arrested, either before or after judgment, on a warrant to be issued by a judge of the court, on affidavits showing either that the debt was fraudulently contracted or that the defendant is fraudulently concealing or removing his property with intent to defraud his creditors. The act further provides for a hearing before the judge issuing the warrant, and testimony on both sides, and if the facts set out in the complaint are established to the satisfaction of the judge he shall require the defendant to give security to pay the debt or to take the benefit of the insolvent law (Act of 16th June 1836). In default of giving such bond he shall be committed to jail, from which, however, he shall be released at any time by complying with the provisions of the insolvent law.

The petition and affidavits in the present case set out that the defendant, being largely in debt to petitioner and others, was secretly converting his property into money for less than its value, with intent to fraudulently remove from the state.

J. F. Lynd and *Ashhurst*, for the plaintiff.

Hanson, for defendant, resisted the application in the first instance upon the ground that the Act of 1842 was not in force, being superseded by the Bankrupt Act of Congress. He relied principally on *Commonwealth ex rel.* v. *O'Hara*, 6 Am. Law Reg. N. S. 765.

HARE, P. J., expressed the opinion that the Act of 1842 is an insolvent, not a bankruptcy Act, as it does not discharge the debt, but merely provides a remedy against fraudulent debt; that the Bankrupt Act was not intended and should not be construed to supersede the action of state courts under Insolvent Acts, except in cases where the bankruptcy jurisdiction is actually invoked; and that although in the case before him the frauds complained of in the plaintiff's affidavit might have been made the subject of an involuntary petition in bankruptcy, yet this was no objection to the defendant being committed under the Warrant of Arrest Act for these frauds.

It is rather remarkable that so much doubt should have arisen and that there should have been so much conflict of decision on a matter which on principle would seem quite clear. Nevertheless, the general tendency of decision not only by the district courts in bankruptcy, but by many state tribunals, seemed at first to set strongly towards holding all the state laws as well for the arrest of

the debtor as for his discharge from imprisonment to be superseded by the Bankrupt Act of 1867. This construction was the more remarkable as several well-known cases, under the former Bankrupt Act of 1841, had put the matter in a very clear light, and shown the distinction between bankrupt and insolvent laws. Thus *Berthelon* v. *Betts*, 4 Hill 577, had settled the law in New York, and in fact the courts of New York do not seem to have hesitated in upholding their continued jurisdiction in these cases.

In re Ziegenfuss, 2 Ired. 463, is a carefully considered decision under the Act of 1841. It was a case of an application for a writ of habeas corpus for discharge from arrest on a capias. The main ground relied upon by counsel for the applicant was that upon filing a petition in bankruptcy, a jurisdiction was acquired over the person and property of the petitioner, which was inconsistent with the jurisdiction of the state courts under the insolvent laws and which necessarily superseded them. Judge BATTLE, in his opinion, says, "I do not deny that to a certain extent the objects of the insolvent laws of this state and the Bankrupt Law of the United States, namely, the equal distribution of the debtor's property *pro rata* among all his creditors, and the exemption of his body from imprisonment, are the same, yet in some respects there are essential differences between them, particularly in this, that the latter goes much farther than the former, inasmuch as it entirely discharges the debts themselves, while the former only releases the body. It is to be borne in mind that the Bankrupt Law nowhere expressly repeals the insolvent laws of the state; so far as the state insolvent laws may prevent or impede the operation of the Bankrupt Law they must yield to it in order that it may fully accomplish its object of establishing a uniform system of bankruptcy throughout the United States; but while the state laws thus yield, they are not entirely abrogated. They exist and operate with full vigor until the Bankrupt Law attaches upon the person and property of the bankrupt, and that is not until it is judicially ascertained that the petitioner is a person entitled to the benefits of the Bankrupt Law by being declared a bankrupt by decree of the court; before that time, I think, upon a sound construction of the Bankrupt Act, it does not necessarily come in conflict with the insolvent laws of the state."

The decision in *Ex parte Eames*, 2 Story 322, was not really inconsistent with this decision, as above mentioned, for the Massachusetts statute there in question was really a bankrupt law, discharging the debt as well as the body of the debtor. And in Philadelphia, under the Act of 1841, the decision of the United States District Court in *Sullivan* v. *Hieskell*, Crabbe 525, s. c. 4 P. L. J. 171, where Judge STORY'S decision in *Ex parte Eames* was cited and considered, and Judge RANDALL arrived at an opposite conclusion as to the Insolvent Law of Pennsylvania, for the sound reason that while the Massachusetts statute discharged the debt, the Pennsylvania Act of 1836 only relieved the debtor from imprisonment. And the Supreme Court of Penna., in *Nesbit* v. *Greaves*, 6 W. & S. 120, had held that an application and discharge in bankruptcy would excuse a compliance with the condition of a bond to take the benefit of the Insolvent Law.

But on the passage of the Bankrupt Act of 1867, there seems to have been a singular tendency at first, even stronger with the state than the federal courts, to carry its application in every respect to the widest limits, and while so extending to the utmost the range of the statute and the special jurisdiction established by it, to narrow correspondingly the ordinary jurisdiction of the state courts, and the common remedies and method of legal redress: *Commonwealth* v. *O'Hara*, 6 Am.

Law Reg. N. S. 765 : *Perry* v. *Langley*, 7 Am. Law Reg. 429 ; *Van Nostrand* v. *Carr*, 2 Bankr. Reg. 485 ; *Martin* v. *Berry*, 37 Cal. 208 ; *Corner* v. *Miller*, 1 Bankr. Reg. 403 ; *In re Reynolds*, 8 R. I. 485 ; *Shephardson's Appeal from Probate*, 36 Conn. 23 ; *Cassard* v. *Kroner*, 4 Bankr. Reg. 569 ; *In re Independent Ins. Co.*, 6 Id. 260 ; *In re Reiman*, 11 Id. 38 ; *Watson* v. *The Citizens' Savings Bank*, Id. 162 ; *Lavender* v. *Gosnell*, 12 Id. 284.

This series of decisions is quite paralleled by those which decided that the mere non-resistance of a debtor to his creditor's getting judgment, which he could not prevent except by a false and vexatious defence or by filing a voluntary petition, was an act of bankruptcy. So far had this doctrine gone that it looked as if all the ordinary modes of collecting debts would have to be laid aside. The Supreme Court of the United States, however, has decided the law to be otherwise in *Wilson* v. *Bank*, 17 Wallace 473. Mr. Justice MILLER says, in delivering the opinion of the court : " We do not construe the act as intended to cover all cases of insolvency to the exclusion of other judicial proceedings."

And the state courts have of course followed what Judge SHARSWOOD, in *Kemmerer* v. *Tool*, 28 P. F. Smith 151, speaks of as "the wise, liberal and reasonable construction of the Bankrupt Act in support of the rights of bona fide creditors," given by the Supreme Court of the United States in that case.

Similarly with regard to assignments for the benefit of creditors, it was quite the general opinion at one time that they were absolutely void as in contravention of the Bankrupt Law. The Circuit Court of the Pennsylvania district never went beyond holding, however, that such assignments were voidable, if assailed within the time limited by the Bankrupt Law, by the assignee in bankruptcy, and the Supreme Court of Pennsylvania, in *Beck* v. *Parker*, 15 P. F. Smith 262, maintained the validity of such assignments as being valid at common law, irrespective of statute, although the statute provides for a distribution of the trust funds. The Supreme Court of the United States, in the recent case of *Meyer* v. *Hillman*, 1 Otto 502, fully confirmed the view that such assignments for benefit of creditors are not void, but at the utmost voidable only ; and Mr. Justice FIELD, in the expression of his opinion, seems strongly to incline towards the decision of Justice NELSON in *Sedgewick* v. *Place*, 1 Nat. Bk. R. 673, and Justice SWAYNE in *Langly* v. *Perry*, 2 Id. 596, and Judge SHARSWOOD'S expression of opinion in *Beck* v. *Parker*, 15 P. F. Smith 262, in favor of the absolute validity of such assignments for creditors, notwithstanding the adjudication in bankruptcy.

The amendments to the Bankrupt Law have also so much restrained the field of its operation, as well by shortening the period in which the various grounds of involuntary proceedings must be taken advantage of by petition, as by requiring the joinder of a large proportion of creditors to maintain a petition, that practically involuntary proceedings are no longer available in ordinary cases as a mode for collecting debts. Thus the tendency both of legislation and judicial construction has been to bring the law back again to what had been settled under the old act.

The case of *Campbell* v. *Harmer* (Supreme Court of Pennsylvania Jan. 1867, 40) is important in this connection, and it is unfortunate it was never reported, as it might have served to counteract the injurious effect of Judge WILLIAMS'S hasty decision in *Commonwealth* v. *O'Hara*. In that case Judge SHARSWOOD had in 1867 granted a warrant of arrest, and after argument refused to quash it even on the ground of a petition in bankruptcy being filed, but held the warrant until Harmer had been by the District Court of the United States for

Eastern District Pennsylvania, adjudicated a bankrupt on the ground of having submitted to arrest for more than seven days, and only on such adjudication had ordered his discharge from the warrant on the ground of the case having then fallen under the federal jurisdiction. This was in harmony with *In re Ziegenfuss*, above cited, and with the decision of the Supreme Court of Iowa, *Reed* v. *Tayler*, 37 Iowa 209, made about the same time, and *Shears* v. *Solhinger*, 10 Abt. Pr. N. S. 287; *Ex parte Jacobs*, 12 Id. 273. In fact the clause in the Bankrupt Law providing that the submission of the debtor to imprisonment shall be an act of bankruptcy, is in itself a strong argument that imprisonment for debt under the state laws is not superseded.

The inconvenience resulting from holding the laws for arrest of fraudulent debtors to be superseded, has been felt with especial severity since the narrowing of the remedial sections of the Bankrupt Law for adverse proceedings by recent amendments, and it is gratifying that the law seems to be now getting pretty well settled in accordance with the old and sounder view.

A very recent decision of the Supreme Court of Errors of Connecticut, *Geery's Appeal*, 43 Conn. 288, has settled the law in that state.

Steelman v. *Mattix*, 36 N. J. 344, may be referred to as a valuable expositive of the law on this subject; the sound distinction is there enforced, that if the object of the statute is distribution of property among the creditors, there may be ground for it being treated as a state bankrupt act, and therefore superseded by federal legislation; but if the object of the statute is the release of the debtor from imprisonment and the debt is not discharged, the distribution of the property among creditors is to be viewed as incidental merely, and the statute is not superseded.

The Supreme Court of Pennsylvania, in *Scully* v. *Kirkpatrick*, 29 P. F. Smith 324, held the Act of 1842 as to arrest, to be in full force in a case where the debt had been fraudulently contracted, and besides the principal case, the courts of Common Pleas, Nos. 1 and 3, of Philadelphia have, in the cases of *Bates* v. *Rowley*, 33 Leg. Int. 202, and *Bond* v. *Hilsen*, 34 Id. 20, held the proceedings by arrest valid even in cases of concealment of property.

A possible difficulty which has been suggested that a debtor having been compelled to give bond to take the benefit of the insolvent laws might be prevented from doing so by an adjudication in bankruptcy on the prayer of the other creditors, is obviated by the liberal and enlightened decision of the Supreme Court of Pennsylvania, in *Barber* v. *Rodgers*, 21 P. F. Smith 362, that the condition of a bond given for discharge from arrest to take the benefit of the insolvent laws will be satisfied by a petition, adjudication and discharge in bankruptcy. There is thus no difficulty in reducing the theory and practice in cases of arrest to a harmonious system. The whole machinery of the state law for arrest and for discharge remains unimpaired and in full force, unless and until the case is drawn within the superior jurisdiction of the federal courts by appropriate proceedings. Until this is done it is not for the state courts to refuse justice under the state laws or to assume that the case is one which either can fall within the federal jurisdiction if invoked, or that the higher jurisdiction will be invoked by any one.

If any party interested desires the relief of the bankrupt laws, the federal courts are open, and where adjudication has taken place, the state courts will release their grasp. The debtor can, without difficulty, transfer the cause into bankruptcy, since there has been no restriction of voluntary bankruptcy, and the condition of his bond will be satisfied whether he or his other creditors bring about the adjudication.

J. F. L.